

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LOIS SAGE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 211,352
<b>ATCHISON CASTING CORPORATION</b>	)	
Respondent	)	
Self Insured	)	

**ORDER**

Respondent appealed the June 2, 1998 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument in Kansas City, Kansas, on January 19, 1999.

**APPEARANCES**

Clark H. Davis of Olathe, Kansas, appeared for the claimant. William G. Belden of Overland Park, Kansas, appeared for the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge found claimant's injury resulted in a 24 percent impairment of function to the body as a whole and also entitled claimant to an award based upon a work disability. Averaging a 100 percent task loss with a 61.2 percent wage loss, the ALJ entered an award for an 80.6 percent permanent partial disability. Although claimant was not working and thus had a 100 percent wage loss, the ALJ found claimant had not made a good faith effort to find appropriate employment and imputed a post-injury wage based upon claimant's ability to earn \$5.25 per hour.

Respondent admits claimant sustained a work-related right upper extremity injury in 1994, but otherwise denies this claim. Respondent seeks Appeals Board review of all issues decided by the ALJ, including:

1. Whether Claimant met with personal injury by an accident arising out of and in the course of employment occurring on a date other than in 1994.
2. Whether Claimant gave Atchison Casting Corporation timely notice of a personal injury by accident arising out of and in the course of employment occurring on a date other than in 1994.
3. Whether Claimant served a timely written claim upon Atchison Casting Corporation as to a personal injury by accident arising out of and in the course of employment occurring on a date other than in 1994.
4. Whether Claimant is barred from receiving temporary total disability benefits or permanent partial disability benefits under K.S.A. 44-501(c), as it existed in 1994, and Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).
5. The nature and extent of Claimant's disability, if any.
6. The value of Claimant's average weekly wage.
7. Whether Claimant is eligible to receive work disability benefits.
8. If Claimant is entitled to receive work disability benefits, the value of such benefits.
9. Whether Claimant is entitled to future medical expenses and unauthorized medical expenses.

#### **FINDINGS OF FACT**

Having reviewed the entire record, the Appeals Board agrees with and adopts the findings of fact set forth by the ALJ in the Award. In addition, the Appeals Board specifically finds as follows:

1. Claimant was injured in a motor vehicle accident in 1990. As a result of that accident, claimant sustained a fracture of her left forearm which required internal fixation. This has impaired her ability to turn or rotate her left arm. After approximately one month claimant was able to return to her regular work duties.
2. In March 1994 claimant was offered a clerical position in the cleaning room. Respondent contends this was an accommodation for problems claimant had performing

her job as a result of the injury suffered in the 1990 automobile accident. Claimant declined this job offer because it paid less than what she was earning.

3. Claimant suffered a work-related injury to her right arm in 1994. Surgery was performed by Dr. Shriwise. After her surgery, claimant worked light duty until she returned to her regular job with respondent on June 4, 1995. One of claimant's coworkers, however, assisted claimant by performing some of the more physically demanding tasks.

4. On April 9, 1996 claimant filed her form E-1 Application for Hearing and Claim for Compensation alleging injuries to her right elbow and wrist.

5. In March 1997, claimant complained to respondent of problems with her left arm. She returned to Dr. Shriwise on March 10, 1997 because of the pain in her arms. Restrictions were recommended and, as a result, claimant was given an accommodated position performing light office work. Claimant is not alleging she suffered injury while performing this office work.

6. On July 14, 1997, claimant was offered several accommodated positions. Her restrictions would not allow claimant to perform the job sorting rods. Claimant rejected a job operating a forklift because it was on second shift and claimant preferred to continue working first shift. There was also some question concerning whether claimant could perform the steering portion of the forklift job. Claimant was also offered a job operating a floor crane which was within her restrictions. Claimant also rejected this job because it was on second shift. The accommodated job claimant selected was the shaker table position. This job did not pay as much as the floor crane operator job but it was on first shift.

7. Claimant performed the shaker table job for two days and for two hours of the third day. Claimant stopped working because the pieces of metal exceeded her weight lifting restrictions. Respondent insists that claimant never asked for assistance in lifting the pieces of metal although help was available. Claimant advised respondent she could not do the shaker table work because it was making her hand hurt. Claimant was given a medical leave of absence and was instructed to stay in contact with respondent in case a job became available that claimant could perform. After leaving work in July 1997 claimant called one time and met with respondent's representative one time. Claimant said she also checked the bulletin board for jobs. Claimant did not, however, call in weekly as she had been instructed to do.

8. After taking a medical leave of absence from respondent, claimant applied for and received unemployment benefits from July until November of 1997. From November 1997 to January 1998, claimant received sickness and accident pay from respondent. Claimant also applied for social security disability which was eventually awarded retroactive to July 16, 1997.

9. On October 14, 1997 claimant filed an amended Application for Hearing alleging bilateral carpal tunnel syndrome from a series of accidents beginning September 1, 1994 and ending July 16, 1997. The ALJ found claimant's date of accident to be a series ending March 10, 1997.

### CONCLUSIONS OF LAW

#### Date of Accident, Notice, Written Claim and K.S.A. 44-501(c).

Although claimant's amended Application for Hearing was filed more than 200 days later, Judge Benedict found claimant's time for filing written claim was extended to one year because it had notice of claimant's injury but did not file an Employer's Report of Accident.<sup>1</sup>

March 10, 1997 is the date claimant was given restrictions and accommodated work and there is no evidence of permanent aggravation after that date despite a temporary return to regular duty work in July 1997. Respondent argues that claimant's date of accident is instead July 16, 1997, her last day worked, based upon the bright line rule announced in Berry.<sup>2</sup> The Appeals Board agrees. The date claimant first missed work or the date restrictions are implemented are rules to be applied where a claimant is not forced to leave work due to her injury.<sup>3</sup> In this case, since claimant ultimately left her work with respondent because she could no longer perform even the accommodated job due to her work-related injuries, the last date worked rule is applicable. Accordingly, the Appeals Board finds claimant's date of accident to be July 16, 1997. Based upon this finding, respondent concedes claimant's notice and written claim were timely.

This finding of a July 16, 1997 accident also resolves the issue surrounding K.S.A. 44-501(c) because of the April 4, 1996 effective date of the amendments.

#### Accident Arising out of and in the Course of Employment, Nature and Extent of Disability, Average Weekly Wage and Authorized, Unauthorized and Future Medical Expenses.

The ALJ found claimant was entitled to disability benefits for the work-related injury she received to her upper extremities. The Appeals Board finds the ALJ's Award should be affirmed. The Appeals Board agrees with the analysis of the evidence and law as set forth in the Award and adopts the ALJ's findings, conclusions and orders as its own.

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<sup>1</sup> K.S.A. 44-520a(a) and K.S.A. 44-557(a) and (c).

<sup>2</sup> Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

<sup>3</sup> Alberty v. Excel Corporation, 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. \_\_\_\_ (1998) and Durham v. Cessna Aircraft Company, 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated June 2, 1998, should be modified to find a July 16, 1997 date of accident but is otherwise affirmed.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Lois Sage, and against the respondent, Atchison Casting Corporation, for an accidental injury which occurred July 16, 1997, at the maximum weekly rate of \$351 for an 80.6% permanent partial general disability, making a total award not to exceed the maximum benefit of \$100,000.00.

As of July 30, 1999, there is due and owing claimant 106.29 weeks of permanent partial compensation at the rate of \$351 per week in the sum of \$37,307.79, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$62,692.21 is to be paid at the rate of \$351 per week until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Clark H. Davis, Olathe, KS  
John B. Rathmel, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director